NO. 22506

IN THE

UNITED STATES COUNT OF APPEALS

FOR THE NINTH CIRCUIT

SEP 13 1968

RUSSELL O. LAW,

Appellant,

vs.

JOINT CHECKER LABOR RELATIONS COMMITTEE, SAN FRANCISCO, an unincorporated association, PACIFIC MARITIME ASSOCIATION, an unincorporated association, ILWU, an unincorporated labor union, ILWU, LOCAL 34, an unincorporated labor union, MATSON TERMINALS INC., a California corporation, et al.,

Appellees.

On Appeal from the United States District Court
for the Northern District of California
Southern Division

APPELLANT'S REPLY BRIEF

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The factual statement with citations to the record appear in the Appellant's Opening Brief, and will not be restated.

I. PRE-EMPTION HAS NO APPLICATION

Respondent's brief contends that LAW's brief raises asserted matters which are within the pre-emption doctrine, and cites various decisions applying the pre-emption doctrine.

It is now established beyond a question that in any action in the courts upon a collective bargaining agreement, that Congress did not intend exclusive jurisdiction in the NLRB but to leave to the courts their normal jurisdiction. This is the direct holding in Vaca v. Sipes, 369 U S. 171.

It is also the direct holding in a suit by an employee upon collective bargaining agreement in Smith v. Evening News Association, 371 U.S. 1957.

The doctrine of pre-emption has no application in this case.

II. COLLECTIVE BARGAINING AGREEMENT

In order to determine if there is a violation of the collective bargaining agreement, the nature and extent of the collective bargaining agreement must be determined by the court. The action is predicated upon the Master Agreement of Clerks, etc. of 1952, with supplements, Exhibit 1 in evidence. This agreement is the only known and disclosed written collective bargaining agreement in existence at the time of the matters involved here, to wit, late 1964 and early 1965. This agreement, pages 20-3, Section 21, covers the grievance machinery. Only awards of arbitration are purported to be conclusive or final. This agreement made in 1952 antedated the Labor Law decisions on grievance-arbitration procedure and it is therefore not constituted an exclusive remedy. Neither is there any provision barring remedies to the courts in any part of the contract.

Late in 1965 there was signed, and disclosed by circulation a new clerk's contract purporting to be effective from 1961. This contract, contrary to the 1952 contract, was drafted after the law developed on grievance-arbitration and it provides that the grievance-arbitration procedure is exclusive and must be exhausted before resort to the courts. This contract contains the provision known as Section 17.81 that permits grievance procedure against employees only for deliberate bad conduct or illegal stoppage of work.

The St. Sure deposition going into the collective bargaining agreement, Exhibit 3, shows the contention that although the 1952 agreement with its supplements was the only writings known or disclosed, there were various

practices and oral understandings that varied, altered and amended the disclosed written agreement of 1952. Not only did Mr. St. Sure testify that the agreements became effective and were changed upon an oral understanding, and it sometimes took months before the written wording could be agreed upon and the writing executed, but he also testified that awards and arbitration were not final but were changed from time to time or amended by mutual agreement of the parties (Ex. 3, pg. 6, 8-9), and this would often be done by the Coast Committee, an organization a creature of the contract.

There were no findings as to which or what contract was in effect at the times involved in this action but only general findings that there was a contract without reference to the writing.

A count in the complaint is one to determine what contract governed and if it were the disclosed written contract or the concealed secret oral agreements and practices in violation of the disclosed written contract that varied, altered and amended the disclosed writing.

III. HEARING WITHOUT NOTICE OR OPPORTUNITY TO APPEAR AND DEFEND.

There are two grievances involved in this matter and are set forth not only in the complaint, but the exhibits to the complaint consisting of the correspondence attempting to utilize the grievance-arbitration procedure on behalf of the plaintiff. LAW was not paid for the full eight hours that he worked on November 23, 1964, at the MATSON TERMINAL. He initiated the necessary steps by taking this pay shortage up through the dispatcher, in the ordinary course of such proceedings. He asked that this matter be heard by some steps in the grievance-arbitration procedure, and was never granted a hearing nor did the Union Local 34 who usurped the power of the statutory collective bargaining agent (the defendant ILWU) in all matters in

the San Francisco region concerning the clerks act in this matter. It was the defendant Local 34, not defendant ILWU, who elected and selected the employee members on the defendant Joint Port Committee. Although it appears without issue that the defendant ILWU, not defendant Local 34, who is the exclusive statutory bargaining agent for all ship clerks employed in the Port of San Francisco, this exclusive bargaining agent did not undertake to do anything in any part of this case.

While the plaintiff LAW's claim for pay shortage of November 23rd was still pending, the defendant Matson Terminal initiated a complaint against the plaintiff in December by filing a form with PMA and the defendant PMA, who through its employee Kucin, wrote the letter of December 3, 1964, to the defendant Local 34. It is on this employer's grievance that LAW first learned of any difficulty on January 13, 1964, when he was sent to the Local 34 hall where he met with the Union Local 34 committee who assured him it was no fault of his and that no blame would attach to him arising out of the incident.

It should be pointed out that it was the practice in most instances for matters to be taken up with the Union and only if formal written charges were filed by the former employer, through PMA, would the matter follow the grievance-arbitration procedure.

The evidence showed that there was a difference of understanding between the members of the Union Local 34 Committee as to what was said, or even the incident of October 23rd was involving the plaintiff. Robb, a member of the Union Committee, testified (Tr. 186) that LAW had stated exactly what had happened and that basically he was trying to follow the instructions of his supervisor and got confused somewhere along the line. He also testified (Tr. 187) that Mr. Hermann stated that he would present

the facts to the employers together with the extenuating circumstances and that it would be good for LAW, no doubt meaning that it would be represented, as Robb understood it, that LAW was carrying out the instructions of the supervisor as he understood them with the result that the longshoreman loaded the wrong cargo in the hold of the ship.

If the new contract which Campion, the business agent of the Local, testified was being applied prior to the disclosure and its signing, then of course only deliberate bad conduct of a clerk in his work or illegal stoppage would be any grounds for discipline.

LAW had understood the direction of his supervisor Harvey to load the conexes in the particular pile into the particular boat. This the longshoreman did with his lift carrying the cargo to the hook from which the cargo was loaded on the ship. It was LAW who discovered that it was loaded in the wrong ship and reported it to his supervisor who immediately corrected the error. This is certainly not deliberate bad conduct nor is it intentional work stoppage, the sole grounds of discipline.

Even the employer's representative Kucin testified that the provisions described in Section 17.81 (the new contract executed and disclosed in August of 1965) had been applied in the process of grievance for many years, and long before the LAW incident in 1964 (Tr. 240).

Mr. Kucin the PMA representative on the Joint Port Committee, testified that they acted solely upon the representations of the Union that LAW was guilty (Tr. 242-3). Kucin also testified (Tr. 245) that he knew of no prior complaint by any employer against LAW and that if one of the some one hundred employers in PMA did not want a particular clerk dispatched to them, they would have filed a complaint.

Mr. Kucin, the PMA employee and a member of the defendant

Port Committee for many years, (since 1954, Tr. 206) testified that there were two halls run by the Committee, one in Oakland and one in San Francisco and that a Union or book man, also designated a registered man, is dispatched for as long as the job lasts while a non-registered man, meaning one who has not been permitted to join the Union, is dispatched for one day only (Tr. 213). He testified that the normal procedure as to the social security man (that is a non-registered man not a member of the Union) his services are terminated -- that is he is no longer dispatched as a ship's clerk (Tr. 219). He testified (Tr. 220) that the Exhibit 14 (the W-2 forms showing LAW's address in Oakland on 57th Avenue) was available to both him and all members of the Committee and the Committee has access to all PMA record section information. He also testified that the new clerk's contract, Exhibit 2, was first distributed in 1965 (Tr. 221).

Mr. Kucin, with more than a decade of experience on the defendant Joint Committee prior to the LAW matter, testified that very few of the charges filed by PMA against employees resulted in dismissal (Tr. 231). He also testified there is a different rule applicable to the registered (that is Union members) and those who are not Union members (Tr. 231).

The plaintiff who relied upon and who looked solely to his ship clerk's employment for his livelihood for nine and one-half years is denied the right to further follow his livelihood by being dispatched as a ship clerk through the ship clerk's hiring hall as a result of this adjudication in the first step of his former employer's grievance, without notice, without an opportunity to present his defense or even to be heard. The kindest way to put it is that the Union in a few minutes' interview did not understand the facts, and did not care to take the trouble to learn, but proceeded contrary to their representations that they would represent him and concurred in the

employer's association action to forever bar Mr. LAW from his livelihood. It appears this is done because there is a different rule applied to non-union men, a different standard of punishment applied to non-union men and different representation because he was a non-union man. Even Kucin admits that the harsh penalty of barring a man from his employment is very rare and the minutes of the meeting show that the employers insisted upon cessation of further dispatch, not for an action of deliberate bad conduct in connection with employment or willful stoppage but for an unintentional act where LAW was attempting to carry out his supervisor's instructions as he understood them and permitted the longshoreman of the lift truck to move conexes to the hook and from there be loaded in the hold; which mistake was obviously that of the superintendent and the longshoreman and not LAW. It is not grounds for punishment or discipline under the contract.

Thus in the first step of the grievance-arbitration procedure which is nonexclusive under the 1952 contract but which is exclusive under the new contract not reduced to writing or distributed until after this incident much later in 1965, did this star chamber procedure arise and LAW was tried in absentia without evidence and forever barred from his livelihood of nine and one-half years. He was not represented by the exclusive bargaining agent, defendant ILWU. He was sold out and doublecrossed by an elected Union Committee of defendant Local 34.

IV. THIS IS NOT A DISCHARGE BUT A BARRING FROM ANY EMPLOYMENT

Respondent's brief under statement of issues poises the question of an employer's right to discharge an employee. This particular statement begs the question. As a nonmember of the Union, and therefore not registered, Mr. LAW was dispatched only for one day at a time. He was dispatched but for one day on November 23rd. He completed the full day's

work. His dispatch ended. Were he a member of Local 34, he would have been dispatched for the entire loading and unloading of the S.S. Dant. There is no question of his discharge by any employer.

More than one hundred employers are members of PMA, and by the contract all employers must employ ship clerks through the two hiring halls in San Francisco. It is the punishment meeted out in trial in absentia in violation of the contract and the denial of any grievance procedure or effective or good faith representation (or indeed any representation) by the exclusive bargaining agent (defendant ILWU) that resulted in this particular litigation. It was barring LAW from any further employment by any of the some hundred other employers of ship clerks in the Port of San Francisco. It is the punishment of preventing future dispatch to any of the some hundred other employers of ship clerks.

It was the failure of the exclusive bargaining agent, the defendant ILWU, to do anything that resulted in this damage.

Defendant ILWU is the exclusive collective bargaining agent for the ship clerks in the Port of San Francisco. It completely abrogated its duty and did not represent any phase nor was it involved in any way in LAW's matter. It did not even select the members of the Union Committee, who are elected by and solely by the book men, members of Local 34. It did not select or elect the employee representatives of the Joint Port Committee. In violation of the contract, which provides it shall be done by the defendant ILWU, the evidence shows it is done solely by Local 34 through election of its members for these employee representatives. It was this Local 34, not the exclusive bargaining agent, the defendant ILWU, that undertook to interview Mr. LAW for a few minutes at the Local 34 offices in San Francisco and who undertook to tell him that they would protect him and fight his cause.

It was the defendant Local 34's Committee who did not represent him at all but confessed him guilty and sat by idly while the employer members excluded LAW from his livelihood as a ship clerk for any future dispatch to any of the one hundred other employers of ships clerks in San Francisco.

There is a total failure of the exclusive collective bargaining agent, the defendant ILWU, to do anything in this matter or to act at all for it sat by and did nothing but purported to delegate all powers to a third person, the defendant Local 34. This, the exclusive statutory collective bargaining agent cannot do. No agent can delegate matters involving discretion or judgment or in whom is reposed trust or confidence without the consent of the principal. It is a matter where as here it involves any matter of discharge, skill or judgment, it cannot be delegated.

Repeated demands for resort to the grievance-arbitration procedure resulted in refusal whether it be the underpayment and wages in dispute or whether it be the trial in absentia without evidence and without notice.

The barring of LAW from his sole means of livelihood was not on a grievance by him. True, it was triggered by his asking for his shortage of pay. It was a grievance of the Matson Terminals through the defendant PMA and in the first phase of the grievance procedure, the plaintiff LAW was forever barred from his sole source of livelihood of nine and one-half years by the star chamber procedures. Respondents contend he is wholly without remedy as to either and he has no recourse to the courts, as they claim he had bona fide representation by the statutory exclusive bargaining agent, though the grievance-arbitration procedure is not made exclusive.

V. NOTICE, AN OPPORTUNITY TO APPEAR AND DEFEND IS A NECESSARY ELEMENT OF ANY GRIEVANCE-ARBITRATION PROCEDURE.

Respondent's Brief contends there is no requirement that LAW,

the subject of an accusation by his former employer, defendant Matson Terminal, would have any notice of any hearing, nor any opportunity to defend, but may be tried in absentia without evidence and convicted and forever barred from his livelihood of nine and one-half years as a ship clerk.

The last part of the decision of Humphry v. Moore, 375 U.S. 335, points out that the drivers, employees of Dealers, were represented by several stewarts as the joint committee meeting who were given an opportunity to and did explain their position; that these drivers had notice of the hearing, and were aware they were locked in a struggle for their jobs and seniority with E&L drivers; that there was no request for any continuance of the hearing until they could secure more representation; and they did not suggest they would have added anything to the hearing by way of facts or theory. The Supreme Court held there was adequate notice of the hearing, and adequate representation.

Here there was no claim of any notice of any hearing or knowledge of any charges or pending difficulty from the former employer Matson Terminals. The letter constituting the charges was sent early in December 1964 by PMA, not to the exclusive statutory bargaining agent, the defendant ILWU, but to Local 34 who did nothing until January 1965 when the photocopy of the letter was sent to the wrong address and was returned undelivered. Although some days remained until the meeting of the defendant Joint Port Committee, Local 34 did nothing. On the morning of January 13, 1965, LAW was not dispatched by the hiring hall but told to go to Local 34 headquarters in San Francisco. He did. Whether or not he received a copy of the PMA December 3rd letter on that date is wholly immaterial. He talked to the Union Local 34 committee but a few minutes. The meeting of the defendant

Joint Port Committee was either that morning or afternoon, and the evidence is conflicting. It would make no difference. The committee to act must have the joint concurrence and vote of both the employers and employee members, each side with one vote. LAW was assured by the Local 34 committee members they would protect him, and fight his battle for him, so no possible harm could come in any event, even if we assume he were told his matter was coming before the defendant Joint Port Committee sometime.

Certainly, notice either just before or a few hours before a meeting of charges serious enough to forever prevent LAW from ever again being dispatched and thus work at his sole means of making a living, is hardly notice required by fair play or due process. It should be noted that in the various correspondence for some months after the date of January 13, 1965, shows LAW did not even have knowledge of the charge as it appeared in the record, and his counsel's attempt to activate the grievance-arbitration machinery stated he had neither notice of any hearing nor knowledge of the charge, and even the reply correspondence shows there was no contention he had no notice nor charges and it was not until the interrogatories to the defendant Unions that any contention was made he received any copy of any charges or the letter of December 3rd, obviously an after thought.

In the very first stage of the grievance-arbitration procedure, the defendant Joint Port Committee meeting of January 13th, not the grievor, but the poor working man against whom a charge serious enough to forever bar him from his sole means of earning a living, was not even present, nor permitted to be present; but he was tried in absentia on the mistaken statement of Herman, president of Local 34, that LAW admitted his guilt. The defendant Joint Port Committee did not act by a vote, as the contract requires, but solely by the action of the employers and the employee members testified

they did not vote.

Any grievance-arbitration procedure that permits a trial in absentia without evidence, and bars a man from making a living at his sole occupation of many years from any of some hundred employers of ship clerks in this port, is clearly bad.

This is particularly true where different procedures are applied and different punishments depending upon whether a man is a book member of defendant Local 34, or not.

This is particularly true where the testimony of both the Local 34 business agent Campion and the PMA employee Kucin both testify that the provisions of discipline, Section 17.81 of the written contract signed and published in August 1965 was being and had been applied for a number of years prior to LAW's matter, and this provision permits discipline of ship clerks only for deliberate bad conduct in connection with his work as a ship clerk or illegal stoppage of work and deliberate misconduct is further defined in the new contract as pilferage, drunkeness and the like, carrying lesser punishment than forever barring a man from any employment by any employer.

In World War II, plaintiff's counsel served as a military government officer in Germany and had to interrogate Russians charged before the Military Government Courts, particularly about the understanding of their rights including right to a lawyer and in every incident the interpreter and the accused always got into an argument about the word "lawyer" or "counsel". Interrogation of the various Russian interpreters always brought out that the accused did not know the meaning of the words. Interrogation of the accused through the interpreter would bring out that if a person were accused with any offense, the police merely investigated, and then he was taken away to prison or was shot. If Russia had criminal courts prior to 1945, the

numerous Russians whom this counsel interrogated had never even heard of them, least of all any word describing somebody who represented an accused in a criminal proceedings. It may well be that the grievance-arbitration proceedings for ship clerks in the Port of San Francisco is copied on the Russian style of justice where a Union who refuses to admit such a clerk to membership may call the clerk in for a few minutes of interrogation, and he is then tried in absentia by his interrogators and accuser without evidence or even notice of any hearing or opportunity to present his side and convicted and forever barred from following his sole means of making a living of many years standing, as punishment; and the conviction is final.

Notice, an opportunity to be heard, and to present a defense is the bare minimum of due process and fair play in any grievance-arbitration procedure before an accused working man is forever barred from working for any other employer as a ships clerk.

It is impossible to conceive of any grievance-arbitration procedure where a former employer can lodge a charge against a working man that will forever bar him from following his livelihood with any of some hundred other employers of ship clerks in the Port of San Francisco, without permitting the working man at some time in the proceedings notice of the accusation, an opportunity to be heard, to appear and defend himself before he is convicted and barred from all future employment by any employer. This is contrary to our basic idea of fair play.

For the exclusive collective bargaining agent ILWU to abrogate its responsibility to the plaintiff in such a matter, and delegate not only the selection of the investigating committee to Local 34 and employee representation on the defendant Joint Port Committee to be chosen not by ILWU, the Union mentioned in the contract, but solely by Local 34 and confine

selection of these employee members of the Port Committee to vote of solely Local 34 members who are but part of the working force of ships clerks is clearly wrong. Certainly the duty of the exclusive collective bargaining agent is not to entirely shirk it, and throw the accused worker to the indifferent representation of Local 34 who refuses to admit him. It is a duty to represent him, fairly and in good faith.

The evidence is without conflict that in a matter resulting in LAW's permanent loss of his means of earning a living of years of standing, Herman, president of Local 34, Campion, business agent, and Robb spent but a few minutes with LAW. Their evidence in the case shows they did not understand his matter, each seeing it differently. They assured him they would defend and protect him. They did neither. Is this bona fide representation by the statutory exclusive collective bargaining agent, defendant ILWU? A stronger case of bad faith, fraud, and abuse of the statutory exclusive bargaining agent's authority and duty to represent LAW could not be imagined, and no trial court's finding it is fair and adequate is supported by the evidence.

VI. A COLLECTIVE BARGAINING AGREEMENT'S RIGHTS AND PRIVILEGES DO NOT DEPEND ON UNION MEMBERSHIP.

The evidence in the case at bar shows that sections of the collective bargaining agreement differentiates between registered, that is book men in Local 34, and nonregistered social security men not holding Local 34 membership. As such it is clearly void and illegal and contrary to the very concepts of labor law as developed in the Federal Courts and by Federal Statute.

There are two procedures in case of an employer's charge by grievance against a working man depending on whether there is Union membership or not. The evidence in the transcript clearly shows it, and the

trial judge so remarked on a number of occasions.

There are two standards of punishment on an employer's grievance against a working man. One for the Union member, and a far harsher one for the non-union worker.

The union member is dispatched for the duration of the loading and unloading of a ship while the non-union worker is dispatched for only a single day.

Earnings are different. The union member gets the health and welfare benefits, the benefits of the Mechanization Fund, (the multimillion dollar fund) and vacation pay. The non-union man does not. Yet each employer pays the same for each ship clerk regardless of union membership or nonmembership in the union. The difference is the fringe benefits, including vacation pay goes solely to the union members.

There is preference of employment and dispatch, for the union member has the preferred status of "registration" while the non-union ship clerk does not.

Any such attempt to differentiate between those working under a collective bargaining agreement on the basis of union membership is per se illegal and void and has been so held by this court in litigation involving both the defendant ILWU and PMA in NLRB v. Waterfront Employers, 9 Cir. '54, 211 Fed. 2d 946.

This case at bar is a strong case, demanding justice and application of established law. In so far as LAW was treated differently depending on his lack of union membership, he has made a clear case for judicial protection and intervention to recover his livelihood, and the punishment must be annulled.

CONCLUSIONS

The judgment for defendant must be reversed and the cause remanded for judgment of both specific relief vacating the defendant Joint Port punishment and for compensatory damages, for loss of services, etc.

September 3, 1968.

Attorney for plaintiff and appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19, and 39 and 40 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

5 Sept '68

Attorney